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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC.,
 Plaintiff,

NO. CV 02-7624 LGB (SHx)

v.

CCBill, LLC, et al.,
 Defendants.

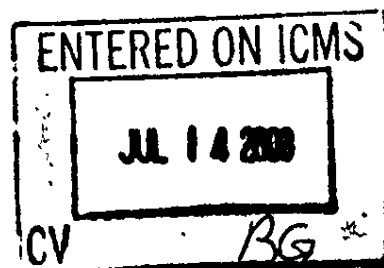
ORDER GRANTING PLAINTIFF'S
 RENEWED MOTION TO LIFT STAY

I. INTRODUCTION

Plaintiff Perfect 10, Inc. ("Plaintiff") brings this action against sellers of Internet pornography. Plaintiff alleges that Defendants have infringed the intellectual property rights of Plaintiff by the misappropriation and sale of copyrighted images owned by Plaintiff. Compl. ¶ 2.

By the instant motion, Plaintiff moves to lift the stay that was imposed pursuant to the Court's January 23, 2003 Order compelling arbitration between Plaintiff and Defendant Paycom and staying the instant action.

For the reasons set forth below, the Court GRANTS Plaintiff's motion and hereby LIFTS the stay on the instant



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1 action.

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3 **II. FACTUAL AND PROCEDURAL BACKGROUND**

4 Plaintiff is a publisher of the adult entertainment
5 magazine, Perfect 10, and the owner and operator of the
6 "perfect10.com" website. Compl. ¶ 24. Defendants fall into three
7 categories: "Billing Company Defendants," "AVS Defendants" and
8 "Content Website Defendants."¹ The Billing Company Defendants
9 include CCBill, LLC; Internet Billing Company ("iBill"); and
10 Paycom Billing Services, Inc. ("Paycom").

11
12 Plaintiff asserts that all Defendants are in the business of
13 selling pornography on the Internet. Compl. ¶ 1. It alleges that
14 the Billing Company Defendants directly sell access to adult
15 content on adult entertainment websites owned by others ("Content
16 Websites") and provide critical business services to these
17 websites. Id. AVS Defendants provide critical marketing,
18 networking, and other operational services for Content websites.
19 Id. Content Website Defendants are owners of Content Websites and
20 directly maintain the content on these websites. Id. Plaintiff
21 alleges that Defendants are engaged in the ongoing deception of
22

23 ¹ AVS stands for Adult Verification Service. Compl. ¶ 36. An
24 AVS is a site in which the proprietor verifies that the consumer
25 is an adult. Id. Once so verified, the consumer can view the
26 content of a number of other websites that are administered by
27 third-parties. Id.
28

1 consumers and the willful and systematic infringement of the
2 intellectual property rights of Plaintiff, third-party
3 publishers, film owners and celebrities. Id. ¶ 2.

4 Plaintiff filed this action on September 30, 2002 against
5 twelve Defendants. It alleges nine causes of action: (1)
6 copyright infringement; (2) trademark infringement; (3) trademark
7 disparagement; (4) wrongful use of a registered mark; (5)
8 violation of a right of publicity; (6) unfair competition; (7)
9 false and misleading advertising; (8) RICO (investment of
10 proceeds); and (9) RICO (participation in criminal enterprise).

11 On December 9, 2003, Defendant Paycom filed a motion to
12 compel arbitration and stay litigation pursuant to a binding
13 arbitration clause between Paycom and Plaintiff. Paycom also
14 moved to sever Plaintiff's claims against it from the claims
15 against the other Defendants pursuant to Federal Rule of Civil
16 Procedure 21. On January 23, 2003, this Court issued an Order
17 Granting Defendant Paycom's Motion to Compel Arbitration and
18 Striking Defendant Paycom's Motion to Sever (the "Jan. 23
19 Order"). The Order also imposed a stay on the entire case pending
20 the resolution of the arbitration. Jan. 23 Order at 28:18-21.

21 Plaintiff dismissed Paycom from the instant action without
22 prejudice on February 4, 2003, pursuant to Federal Rule of Civil
23 Procedure 41(a)(1)(i). Plaintiff also withdrew the pending
24 arbitration without prejudice on March 14, 2003. The two parties
25 tolled the statute of limitations for all claims between them for
26 36 months. Declaration of Sean Morris in Support of Plaintiff's
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1 Renewed Motion to Lift Stay, Ex. A. On March 24, 2003, Plaintiff
2 filed a motion to lift the stay. This Court denied Plaintiff's
3 motion on April 14, 2003 for failure to comply with the meet and
4 confer requirements of Local Rule 7-3.

5 On June 9, 2003, Plaintiff filed a renewed motion to lift
6 the stay. Defendant Internet Key filed an Opposition to
7 Plaintiff's Motion to Lift Stay on June 16, 2003 and Defendants
8 Internet Billing Company and CCBill filed a late Opposition on
9 June 26, 2003.² Plaintiff filed Replies to Defendants'
10 Oppositions on June 23, 2003 and July 1, 2003.
11

12 13 **III. MOTION TO LIFT STAY**

14 **A. Legal Standard**

15 A court may stay litigation pending the resolution of
16 arbitration of any issue referable to arbitration proceedings. 9
17 U.S.C. § 3. A trial court's inherent power to control its own
18 docket and calendar includes the discretionary power to grant or
19 lift a stay on litigation pending the resolution of arbitration
20 proceedings. See Mediterranean Enters., Inc. v. Ssangyong Corp.,
21 708 F.2d 1458, 1465 (9th Cir. 1983).

22 A motion to compel arbitration and stay proceedings is not
23 considered the equivalent of an answer or motion for summary
24 judgment. Hamilton v. Shearson-Lehman Am. Express, Inc., 813 F.2d
25 1532, 1535 (9th Cir. 1987). Therefore, a party may dismiss a
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27 ² The Court deems iBill's and CCBill's late opposition to
28 be timely.

1 defendant without leave of the court following an order
2 compelling arbitration. Id.

3 Plaintiff may voluntarily dismiss a defendant that has not
4 filed an answer or moved for summary judgment without a court
5 order. Fed. R. Civ. P. Rule 41(a)(1). A notice of dismissal acts
6 as an automatic termination and leaves the parties as though no
7 action had been brought. Commercial Space Mgmt. Co. v. Boeing
8 Co., 193 F.3d 1074, 1077 (9th Cir. 1999). A court has no
9 discretion to condition a notice of dismissal under Rule 41(a)(1)
10 as being "with" or "without" prejudice. Id. at 1078.
11

12
13 B. Analysis

14 Plaintiff argues that its voluntary dismissal of all
15 litigation and arbitration proceedings against Paycom
16 necessitates the vacation of the stay on the instant action.
17 Pl.'s Renewed Motion to Lift Stay at 6:7-9. Defendants maintain
18 that Plaintiff must dismiss all claims against Paycom with
19 prejudice to avoid manipulation of the Court's Jan. 23 Order.
20 Opp'n by Defs. iBill & CCBill at 5:23-28.

21 A denial of Plaintiff's motion to lift the stay would
22 require Plaintiff either to refile claims against Paycom in order
23 to complete arbitration or to revise the notice of dismissal to
24 indicate a dismissal with prejudice. Pl.'s Reply to Opp'n by
25 Defs. iBill & CCBill at 1:14-19. The stay of the instant action
26 pending arbitration was imposed to serve judicial economy. Jan.
27 23 Order at 28:18-21. The Court does not find that requiring a
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1 party to refile claims against a dismissed party increases
2 judicial economy.

3 Paycom's motion to compel arbitration is not considered an
4 answer or motion for summary judgment for purposes of allowing a
5 notice of dismissal. Hamilton, 813 F.2d at 1535. Therefore,
6 Plaintiff has the "absolute right" to dismiss Paycom without
7 leave of the court. See Commercial Space, 193 F.3d at 1077. While
8 an order denying a vacation of the stay would not be a direct
9 order to change the terms of the notice of dismissal, it would
10 leave Plaintiff with no other available option. See Pl.'s Reply
11 to Opp'n by Defs. iBill & CCBill at 4:3-6. The Court lacks any
12 discretionary power to condition Plaintiff's notice of dismissal
13 at Defendants' request. Commercial Space, 193 F.3d at 1074.

15 A notice of dismissal under Rule 41(a)(1) is an automatic
16 termination such that this Court loses jurisdiction over the
17 dismissed claims and cannot rule on the merits within them. See
18 Commercial Space, 193 F.3d at 1077. Therefore, the Court is
19 unable to affect the terms of the notice of dismissal based on
20 mere arguments of increased judicial economy. See Opp'n by Defs.
21 iBill & CCBill at 3:22-24. Plaintiff and Paycom have voluntarily
22 agreed to a dismissal without prejudice and the Court sees no
23 grounds to take the unusual step of interfering with their
24 decision.

25 The Court is not persuaded that this case is "almost
26 identical" to the facts of Paul Revere Variable Annuity Insurance
27 Company v. Zang, 248 F.3d 1 (1st Cir. 2001). Opp'n by Defs. iBill
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1 & CCBill at 5:5-8. The court in Paul Revere ordered the plaintiff
2 to enter into arbitration proceedings against all related
3 defendants even though only one had standing to compel
4 arbitration. 248 F.3d at 4-5. It then refused to excuse the
5 plaintiff from mandatory arbitration proceedings against the five
6 other defendants after the plaintiff dismissed this one defendant
7 with whom they had an arbitration agreement. Id. The remaining
8 Defendants in the instant action were not included in the
9 mandatory arbitration proceedings, but any litigation against
10 them was stayed. Jan. 23 Order at 28:5-7. Therefore, Plaintiff
11 would not only be prevented from proceeding against these
12 remaining Defendants in its chosen forum, but would be prevented
13 from proceeding in any judicial forum at all.


14
15 While an attempt to "game the system" should not be
16 condoned, the Court considers the inability of Plaintiff to
17 pursue the merits of its claims against the remaining defendants
18 as more worrisome. See Paul Revere, 248 F.3d at 8 (finding
19 insufficient injustice to overturn a court order when plaintiffs
20 retained a right to pursue their claims against the remaining
21 defendants in arbitration).

22 23 IV. CONCLUSION

24 Based on the foregoing, the Court GRANTS Plaintiff's motion
25 and hereby LIFTS the stay on the instant action.
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1 IT IS SO ORDERED.

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3 Dated: July 11, 2003

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5 LOURDES G. BAIRD
6 United States District Judge
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